Abdul Aziz bin Mohd Sharif v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-05–7 OF 2003
MOHD GHAZALI, RAUS SHARIF AND HELILIAH JJCA
2 SEPTEMBER 2008

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Criminal Law — Penal Code (Malaysia) — s 302 — Murder — Conviction for, appeal against — Whether misdirection by trial judge — Whether trial judge erred in not considering all exceptions to s 300 of the Penal Code

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The accused/appellant ('appellant') was charged with the murder of one Balakrishnan a/l Kuppusamy ('the deceased'). At the end of the prosecution's case, the trial judge found that the prosecution had made out a prima facie case against the appellant on the offence charged and called upon the appellant to enter his defence. The appellant in his evidence said that he was acquainted with the deceased's daughter and that in March/April 1998 the deceased had come to the appellant with a stick and scolded him for mixing with his daughter. The appellant testified that on 7 April 2000 he had dinner and left his sister's house at 8pm. On his way home on his motorcycle, he happened to pass the deceased who had made some sign and uttered some words which he could not make out. Thereafter the appellant had made his way to the deceased's house to ask him what he had meant to say when the deceased tried to hit him. According to the appellant a scuffle broke out and during that scuffle the deceased had grabbed hold of the *parang* from its sheath and the appellant was cut when he tried to hold on to his *parang*. He then testified that they both fell and when he managed to get back possession of the *parang* he went to his sister's house for assistance to get home. The appellant insisted that when he went to meet the deceased he had no intention of killing him and also denied having stabbed the deceased. He also said that he had not seen the deceased's wife during the scuffle with the deceased. The trial judge convicted the appellant for the murder and sentenced him to death in accordance with s 302 of the Penal Code ('the Code'). The appellant appealed against that conviction on the grounds that the deceased had not been sufficiently identified; that the trial judge had failed to appreciate the contradiction in the evidence of the deceased's wife who testified that she saw the appellant slashed the deceased, and the doctor who conducted the post-mortem who said that the fatal injury could have been caused by a fall on the weapon; that the trial judge never considered the evidence of the three defence witnesses who had given evidence on the previous acts of provocation by the deceased; and that the trial judge had

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misdirected himself by not considering all the exceptions to s 300 of the Code.

Held, dismissing the appeal:

(1) There were no merits to the appellant's first issue that the deceased had not been sufficiently identified. The evidence of the hospital assistant attached to the Klinik Kesihatan Palong, the investigating officer, the doctor who conducted the post-mortem and the deceased's brother showed that the deceased had been sufficiently identified (see para 25).

(2) The issue of the contradiction in the evidence of the deceased's wife and the doctor who conducted the post-mortem was a non-issue. It was only under cross-examination that the doctor had said that it was also possible for the injury to be sustained by someone falling on the *parang*. Since it was clear that the doctor was speaking generally when he opined as such there was no contradiction in his testimony and that of the deceased's wife who said that she saw the appellant slashing the deceased (see para 26).

(3) The evidence of the three defence witnesses namely, the appellant's brother-in-law, the deceased's neighbour and her husband did not have much bearing on the case as a whole. Their testimony merely showed that the deceased had a quarrel with the appellant on 12 March 1998 and that there was a tiff between the deceased and his neighbours sometime in 1997, which was totally unrelated to the quarrel between the deceased and the appellant in 1998. Moreover the murder in question was committed some two years after the quarrel between the appellant and the deceased (see paras 27–28).

(4) The appellant's contention that he had approached the deceased to seek clarification as to what he had said or some sign he had made at him could not amount to a defence of provocation. As such none of the exceptions under s 300 of the Code could have any application to the facts of this case. Furthermore, there was a lapse of time or a cooling-off period from the time the deceased and the appellant passed each other on the road to the time the appellant confronted the deceased at his house. In any case, even if the deceased had made some sign or uttered some words these acts did not amount to provocation by the standard of a reasonable man as to warrant a retaliation by the appellant with a *parang*. The bodily injuries inflicted upon the deceased were clearly disproportionate to the act of provocation, if any (see paras 34–35).

[Bahasa Malaysia summary

Tertuduh/perayu ('perayu') telah dituduh dengan pembunuhan seorang

bernama Balakrishnan a/l Kuppusamy ('si mati'). Di akhir kes pendakwaan, hakim perbicaraan mendapati pihak pendakwaan telah membuktikan satu kes prima facie terhadap perayu di atas kesalahan yang dituduh dan memanggil perayu untuk memasukkan pembelaan. Perayu dalam keterangannya mengatakan bahawa dia berkenalan dengan anak si mati dan bahawa dalam bulan Mac/April 1998 si mati telah menemui perayu dengan sebatang kayu dan memarahinya kerana bergaul dengan anak perempuannya. Perayu memberi keterangan bahawa pada 7 April 2000 dia telah makan malam dan meninggalkan rumah kakaknya pada pukul 8 malam. Dalam perjalanan pulang dengan menaiki motosikalnya, dia kebetulan melalui rumah si mati yang telah membuat beberapa isyarat dan mengucapkan beberapa perkataan yang tidak difahaminya. Selepas itu perayu menuju ke rumah si mati untuk bertanya apa yang dimaksudkannya apabila si mati cuba memukulnya. Menurut perayu satu pergaduhan telah terjadi dan semasa pergaduhan itu si mati telah mengambil sebilah parang daripada sarungnya dan perayu tercedera apabila dia cuba untuk menahan parang itu. Dia kemudiannya memberi keterangan bahawa mereka jatuh dan apabila dia berjaya mendapat balik milikan parang tersebut dia pergi ke rumah kakaknya untuk mendapatkan pertolongan untuk pulang ke rumah. Perayu menegaskan bahawa semasa dia pergi menemui si mati dia tidak berniat untuk membunuhnya dan menafikan telah menikam si mati. Dia juga mengatakan dia tidak nampak isteri si mati semasa pergaduhan itu. Hakim perbicaraan mensabitkan perayu dengan pembunuhan dan menjatuhkan hukuman mati menurut s 302 Kanun Keseksaan ('Kanun tersebut'). Perayu merayu terhadap sabitan tersebut atas alasan bahawa si mati tidak dikenalpasti secukupnya; bahawa hakim perbicaraan gagal untuk menyedari percanggahan dalam keterangan oleh isteri si mati yang memberi keterangan yang dia nampak perayu mengelar si mati; dan doktor yang membuat post-mortem yang mengatakan kecederaan yang membawa maut itu mungkin disebabkan oleh terjatuh ke atas senjata tersebut; bahawa hakim perbicaraan tidak pernah mengambilkira keterangan oleh tiga saksi pembelaan yang telah memberi keterangan ke atas tindakan provokasi oleh si mati sebelum ini; dan bahawa hakim perbicaraan telah tersalah arah dengan tidak mengambilkira kesemua kecualian s 300 Kanun tersebut.

Diputuskan, menolak rayuan:

(1) Tidak terdapat merit kepada isu pertama perayu bahawa si mati tidak dikenalpasti secukupnya. Keterangan pembantu hospital yang bekerja di Klinik Kesihatan Palong, pegawai penyiasat, doktor yang melakukan post-mortem dan abang si mati menunjukkan si mati telah dikenalpasti secukupnya (lihat perenggan 25).

(2) Isu percanggahan keterangan isteri si mati dan doktor yang melakukan post-mortem adalah bukan satu isu. Hanya di bawah pemeriksaan balas doktor menyatakan bahawa kecederaan tersebut mungkin juga diperolehi oleh seseorang yang jatuh ke atas parang tersebut. Memandangkan ia adalah jelas bahawa doktor bercakap secara umum apabila dia berpendapat tidak terdapat percanggahan dalam keterangannya dan isteri si mati yang mengatakan dia telah melihat perayu mengelar si mati (lihat perenggan 26).

(3) Keterangan oleh tiga saksi pembelaan iaitu, abang ipar perayu, jiran si mati dan suaminya tidak banyak mempengaruhi kes ini secara keseluruhannya. Keterangan mereka hanya menunjukkan bahawa si mati telah bergaduh dengan perayu pada 12 Mac 1998 dan terdapat salah faham antara si mati dan jiran-jirannya sekitar tahun 1997, yang langsung tiada kaitan dengan pergaduhan antara si mati dan perayu pada tahun 1998. Lebih-lebih lagi pembunuhan yang dipersoalkan telah dilakukan dua tahun selepas pergaduhan antara perayu dan si mati (lihat perenggan 27–28).

(4) Hujahan perayu bahawa dia telah menemui si mati untuk mendapatkan penjelasan berkenaan apa yang dicakapnya atau berhubung beberapa isyarat yang dibuatnya tidak membentuk pembelaan provokasi. Oleh itu tiada kecualian di bawah s 300 Kanun tersebut boleh digunakan kepada fakta-fakta kes ini. Tambahan, terdapat keluputan had masa atau tempoh reda dari masa si mati dan perayu bertembung di jalan hingga masa perayu berdepan dengan si mati di rumahnya. Bagaimanapun, walaupun si mati telah membuat beberapa isyarat atau mengucapkan beberapa perkataan perbuatan tersebut tidak membentuk provokasi mengikut piawai seorang yang munasabah untuk mewajarkan tindak balas oleh perayu dengan sebilah parang. Kecederaan badan yang dilakukan ke atas si mati jelas tidak seimbang dengan tindakan provokasi, jika ada (lihat perenggan 34–35).]

Notes

For cases on s 302 of the Penal Code (Malaysia), see *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

Cases referred to

Vijayan v PP [1975] 2 MLJ 8, CCA (refd)

Legislation referred to

Penal Code ss 299, 300, Exceptions 1, 2, 3, 4 to s 300, 302

Appeal from: Criminal Trial No 45–8 of 2000 (High Court, Seremban)

Harbhajan Singh (Ameenuddin Ibrahim with him) (Zubaidah Ameen & Harbhajan) for the appellant.
Wong Chung Kiat (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] This is the unanimous decision of the court.

[2] The appellant was convicted for the murder of one Balakrishnan a/l Karuppusamy ('the deceased') and was sentenced to death in accordance with s 302 of the Penal Code ('the Code'). The appellant appealed against his conviction to this court. We had dismissed the appeal and our grounds for doing so are as follows.

[3] The offence was committed on 7 April 2000 sometime at about 10.30pm at house No 50, Blok 3, Felda Palong 11, Ladang Geddes, Gemas, district of Jempol, Negeri Sembilan ('the said house'). The deceased was living in the said house with his wife, Patmavathi a/p Sreeni ('SP3'). They have seven children. The eldest child is a daughter named Leelawathi who was a Form Three student at the material time.

[4] In her evidence SP3 testified that at about 9.30pm on 7 April 2000, ie, the day of the incident, whilst she was at home with the deceased, there was a knock on the kitchen-door to the said house. The deceased who had just finished his dinner and was washing up went to open the door. Upon opening the door, the appellant who was then wearing a face mask rushed in. There was struggle between the appellant and the deceased and in the midst of it, the appellant slashed the deceased at the neck with a *parang*. When the deceased fell on to the floor, the appellant sat on his body and began slashing the deceased's stomach with the *parang*. SP3 attempted to stop the appellant and managed to take off the appellant's face mask but in the midst of the struggle was also slashed with the *parang*. The appellant then left the said house by the kitchen-door. She screamed for help. Later somebody called for an ambulance.

[5] Under cross-examination, SP3 said that she knew the appellant since 1998. She also agreed that the appellant was courting her daughter Leelawathi sometime in 1998 which resulted in a quarrel between the deceased and the appellant over that relationship. She also agreed that strong words were used during the quarrel.

[6] L/Kpl Mohd Fauzi Shukur ('SP17') who was attached to the Pondok Polis Felda Palong 12 since 1996 testified that on 13 March 1998, the deceased came to the said police post and lodged a report against the appellant. The report read as follows:

> Pada jam l/kurang 1.00 pagi 13/3/98 saya balik kerumah saya di rumah saya di No 50 Felda Palong (11) dapati anak perempuan saya nama Nilapathi baru balik ke rumah juga saya pun bertanya kepadanya diberitahu baru balik berjumpa dengan Abdul Aziz. Selepas itu saya pun pergi berjumpa dengan Abdul Aziz yang menumpang tinggal di rumah abangnya di No 53, Blok 3, Plg 11. Apabila saya berjumpa dengannya dan bertanya mengapa menggangu anak saya, berlakulah satu pertengkaran dengannya. Oleh sebab itu saya datang ke Pondok Polis Plg 12 buat report.

[7] Mohd Hisham Abd Hamid ('SP5'), a hospital assistant who at the material time was attached to the Klinik Kesihatan Palong 9, 10 and 11 testified that at about 11pm on the day of the incident, he received a call for an ambulance. He then rushed to the said house and saw the deceased lying in a pool of blood. Upon checking, he concluded that the deceased was dead. He left the body there and later brought SP3 to the Klinik Kesihatan Palong where he treated her wounds and subsequently sent her home. He was of the view that the two wounds on SP3 which required stitching were caused by a sharp object like a knife or *parang*.

[8] Aminah Mohd Shariff ('SP8'), the appellant's sister, who was residing with her family at house No 53 Felda Palong 11 which was situated behind the said house testified that on the day of the incident, the appellant who was living with their mother at Taman Penarikan, Bahau came to her house at about 8pm on a motorcycle bearing registration No 3774. He was wearing a belt. There was a *parang* in a sheath hooked on to his belt. She testified that he looked drunk and smelt of liquor. The appellant then had dinner with her. He informed her that the deceased had scolded him and accused him of being a drunkard and a thief. He looked angry and so she advised him to ignore what people say about him and to go home. After dinner, he left her house saying that he was going to look for honey.

[9] SP8 then said at about 11–12pm whilst she was asleep, she heard the appellant calling her. The appellant then entered her house and sat on the floor. She noticed that his hand was bleeding. She took a sarong and used it as a bandage for the wound. The appellant then asked her to call her son named Amir Hussain ('SP9'), who was 14 years old at the material time, to send him home as he was not in a position to ride his motorcycle on his own.

[10] SP9 confirmed that on the day of the incident, the appellant came to his house in a drunken stupor and left at about 9pm. He came on motorcycle

bearing registration No 3774. He then said at about 11pm–12pm the appellant again came to his house. His hand was bleeding and was wrapped in a piece of cloth which was soaked with blood. When SP9 asked why he was bleeding, the appellant said that he fell from a tree where he was taking honey. SP9 then sent the appellant to his house in Rompin on the said motorcycle. During the journey, the appellant who was riding pillion requested him to send him to the house of one Ganes Krishnan ('SP6'). SP6, who was then at home went to look for a motorcar to send the appellant to the hospital.

[11] In his evidence, SP6 testified that at about 2am on 8 April 2000, whilst he was sleeping in his house at Kawasan Ladang New Rompin, Jempol, the appellant came with SP9 on a motorcycle. He noticed that the appellant's hand was bleeding and was wrapped with a piece of cloth. The appellant informed him that he fell from a tree while looking for honey and was injured by his *parang*. When he saw that the appellant's shirt was soaked with blood, he took it off and soaked it in a pail and gave the appellant another shirt to put on. He then asked for help from a neighbour, one Martua Chairulama bin Abdul Rahman ('SP7') who owned a motorcar, to send the appellant to the hospital. They then went to pick up the appellant's mother before sending the appellant to the hospital. The appellant was ordered by the doctor who examined him to be warded and hence they left him there. Prior to sending the appellant to the hospital, he kept the parang, the motorcycle and the blood-soaked shirt in his house. Later, a team of police officers who were looking for the appellant came to his house and took the parang, the motorcycle and the blood-soaked shirt.

[12] Dr Nasir Abd Malek ('SP16') who was on duty in the Kuala Pilah Hospital on 8 April 2000 was informed about the appellant at about 5am. He testified that according to the hospital's records, the appellant was brought to the hospital's emergency unit at about 3.30am and was treated for his wounds. He then examined the appellant. He opined that the appellant's wounds may have been caused by a sharp object like a knife or *parang*.

[13] The investigation officer of the case, ASP Asuar Hj Rahmat ('SP4') testified that he was informed of the incident at about 1.30am on 8 April 2000. He then went to the scene of the crime at about 2am with a police team to conduct investigations. He saw the deceased, who was wearing a pair of blue shorts without a shirt, lying on the floor in a pool of blood. He found him to be dead. He also met SP3. He then instructed his men to bring the body to the Kuala Pilah Hospital by police vehicle. At about 4am a police dog team arrived at the scene of the crime and the dog led the police to SP8's house. He found blood stains at the back-door of the house and also in the house. At about 4.55am he proceeded to SP6's house at Ladang New

Rompin. He later met SP6 who then informed him that the appellant was sent to the Kuala Pilah Hospital. He then instructed another police team to go to the hospital and arrest the appellant. He seized from SP6 the motorcycle, the *parang* and the appellant's shirt which was being soaked in a pail. He also discovered blood-stains on the front mudguard of the motorcycle. In the course of further investigation he seized a pair of *Adidas* track suit bottom from the appellant's house.

[14] Dr Rajasingam a/l Ramasamy ('SP2'), a doctor and a pathologist who was as the material time attached to the Kuala Pilah Hospital testified that at about 1.30pm on 8 April 2000, he conducted a post-mortem on the deceased. He said that the deceased was identified by Inspector Richard Akin ('SP14') and one Jayapardiam a/l Karuppusamy who was the deceased's brother. He testified that the cause of death was a 'stab injury to the heart' and was of the view that the injuries found 'could have been caused by a long sharp weapon which can go through like a *parang*'. He said

> An instrument like this *parang* can cause the injuries on the deceased.
>
> A 'stab' is an incised wound whereby the depth is longer than the length of the injury.

He described the injuries that he discovered during the post-mortem that he conducted on the deceased as follows:

(1) An incised wound 5cm places horizontally on the right side of the forehead and 7cm above the right eyebrow.

(2) The incised wound 7cm placed vertically on the mid upper aspect of the forehead and 7.5cm above the medial end of the left eyebrow, ie, close to the middle. A corresponding incised wound was seen on the skull surface measuring 3cm.

(3) An incised wound 17cm placed over the mid clavicular line on the right inner aspect of the shadder joint and directed medially.

(4) Superficial abrasion 13cm x 4cm was noted over the outer front aspect of the right shoulder joint.

(5) An incised would 8cm over the right upper side of the front chest slanting inwards from the right of the neck to midline.

(6) A superficial incised wound 7cm in length, 2cm below and parallel to injury No 5. This wound begins at the lower end of injury No 5 and extended downwards and inwards.

(7) An incised wound 7cm directed vertically over the inner upper of left arm just below the exilla.

(8) An incised wound 3cm placed obliquely over the lower back aspect of the right forearm 4cm above the wrist joint.

(9) An irregular superficial abrasion 13cm x 6cm over the front aspect of the middle third of the right upper arm.

(10) Incised stab wound 'V' shaped 7cm x 3.5cm over the lower first of left chest 7cm below the nipple in the mid claricular line. This injury has penetrated the chest cavity through the 8th intercoastal space directed upwards and inwards causing a stab wounds on the lower lobe of the left lung measuring 2.5cm. This wound extended to cut the pericardium on the front of the heart and further completely cutting obliquely through the heart and exposing the entire venticular and artial cavity. The qorta and the pulmonary track were both severed at its origin.

[15] At the conclusion of the case for the prosecution and after hearing submissions proffered by the learned deputy public prosecutor and learned counsel for the appellant, the learned trial judge ruled that the prosecution has made out a prima facie case against the appellant on the offence charged and consequently called upon the appellant to enter on his defence.

[16] The appellant elected to give evidence on oath. In his evidence-in-chief he said that he was acquainted with the deceased's daughter, Leelawathi in March/April 1998. The deceased scolded him when he came to know about the relationship. About one month later after that incident he went to SP8's house and met Leelawathi near SP8's house. They had a conversation for about half an hour and she then left. At about 5pm the same day, the deceased came with a stick and scolded him for mixing with his daughter. After that incident, he did manage to meet Leelawathi on a few other occasions.

[17] The appellant then said that on 7 April 2000 he and a few of his friends drank toddy in the afternoon. In the evening the same day he went to SP8's house at about 8pm. SP8 scolded him for being drunk. He then had dinner and left SP8's house at about 9pm. On his way home on his motorcycle, he happened to pass the deceased who was travelling in the opposite direction also on a motorcycle. The deceased made some sign at him and uttered some words which he could not make out. Consequently he turned around his motorcycle and went back to SP8's house with the intention of looking for the deceased. He wanted to know why the deceased had behaved in that way towards him.

[18] Upon reaching SP8's house, he saw the deceased standing behind the said house. The back-door to the said house was ajar. The deceased scolded

A him. He then approached the deceased and asked what the latter said to him when they passed each other on the road earlier. The deceased who was standing at the back-door of the said house then tried to hit him. There was a scuffle. During the scuffle, the deceased grabbed hold of his *parang* and managed to take the *parang* out from its sheath. He was cut when he tried to
B hold on to his *parang*. The deceased then managed to drag him into the said house. During the scuffle they both fell. He managed to get back possession of the *parang* and then ran to SP8's house. As he was scared to inform SP8 as to what had happened, he rode away on his motorcycle with the intention of going home. After travelling a short distance away, he fainted and fell from
C his motorcycle. He then left it there and walked back to SP8's house. Upon arrival, he informed SP8 that he fell from a tree while collecting honey. SP9 then brought him on his motorcycle to SP6's house. SP6 took off his blood-soaked shirt and gave him another shirt to wear. SP6 managed to rent a motorcar and sent him to the Kuala Pilah Hospital. He left his *parang* in
D SP6's house. He also informed the doctor treating him that he fell from a tree and hurt himself. He was later arrested by the police.

[19] The appellant insisted that when he went to meet the deceased he had no intention of killing him. He also denied having stabbed the deceased. He
E further said that during the scuffle with the deceased, he did not see the deceased's wife, ie, SP3.

[20] Six witnesses were called by the defence. SD2, SP8's son said that he remembered the incident in 1998 when the deceased came to SP8's house
F with a stick and wanted to beat the appellant for talking to Leelawathi. SD4, a friend of the appellant, said he drank toddy with the appellant in the afternoon on the day of the incident.

[21] SD5, SP8's husband remembered an incident in 1998 where he and
G the deceased went to look for the appellant and Leelawathi who was then not at home. The deceased had then suspected that his daughter had ran away with the appellant. When they came back from the search, they met the appellant in front of his ('SD5') house whereupon the deceased threw a
H punch at the appellant. He managed to calm both parties.

[22] SD6, a neighbour of the deceased said that the deceased and SP8 were quarrelsome. SD7, another neighbour of the deceased also said that the deceased was quarrelsome.

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[23] At the conclusion of the trial, after considering all the evidence before him, the learned trial judge found that the prosecution has proved its case

beyond reasonable doubt and consequently found the appellant guilty of the offence of murder as charged and convicted him. The appellant appealed.

THE APPEAL

[24] Before us, counsel for the appellant raised four issues, namely:

(a) that the deceased has not been sufficiently identified;

(b) that the deceased's wife (SP3) testified that she saw the appellant slash the deceased whereas the doctor (SP2) who conducted the post-mortem on the deceased said that the fatal injury could have been caused by a fall on the weapon;

(c) that the learned judge never considered the evidence of SD5, SD6 and SD7, namely, that these three witnesses for the defence adverted to previous acts of provocation by the deceased; and

(d) that the learned trial judge misdirected himself and erred in law when he only considered Exceptions 1 and 2 of s 300 of the Penal Code; he did not consider Exceptions 3 and 4 of s 300 and also s 299 of the Penal Code.

[25] We find no merits on the first issue raised, that is, that the deceased has not been sufficiently identified. The evidence showed that when SP5, the hospital assistant went to the said house, SP3, the deceased's wife was there with the deceased's body lying on the floor. When SP4, the investigation officer of the case went to the said house at about 2am on 8 April 2000, he met SP3 and saw the deceased's body lying on the floor. The evidence also showed that SP2, who conducted the post-mortem on the deceased, testified that the deceased was identified by Inspector Richard Akin (SP14) and one Jayapardiam a/l Karuppusamy who was the deceased's brother. We are of the view that these facts showed that the deceased has been sufficiently identified.

[26] On the second issue raised, we are of the view that this is really a non-issue. SP2 testified that the cause of death was a stab injury to the heart. It was only under cross-examination and obviously in answer to a suggestion put by counsel for the defence was when he said that it is also possible that such an injury could have been caused by someone falling on the *parang*. This was what he said under cross-examination:

> A 'stab' is an incised wound whereby the depth is longer than the length of the injury.
>
> Someone who has stabbed the deceased with a *parang* could have caused such an injury.

A It is also possible that the injury could have been caused by someone falling on the instrument.

It is clear that SP2 was speaking generally when he opined as such. Consequently, we cannot see any contradiction with the testimony of SP2 and the evidence of SP3 who said that she saw the appellant slashing away at B the body of the deceased.

[27] The third issue raised by counsel relates to the defence of provocation. He argued that the learned trial judge never considered the evidence of SD5, SD6 and SD7, which were not seriously challenged by the prosecution, with C regards to previous acts of provocation by the deceased, namely:

(a) SD5, the husband of SP8, said that on 12 March 1998 the deceased and the appellant had a quarrel when the deceased noted that his daughter Leelawathi was missing from home that day. During the quarrel the D deceased punched the appellant.

(b) SD6, who was the deceased's neighbour said that the deceased was a quarrelsome person and had on one occasion sometime in 1997 called her a prostitute. She informed her husband (SD7) about it and he later confronted the deceased armed with a *parang*. The deceased then armed E himself also with a *parang*. She then asked SD7 to come home, which to us would denote that nothing untoward happened that day. SD7 confirmed the incident with the deceased as related to by SD6.

F **[28]** We are of the view that the evidence of SD5, SD6 and SD7 did not have much bearing on the case as a whole. What it merely showed was that the deceased had a quarrel with the appellant on 12 March 1998 and that there was tiff sometime in 1997 between the deceased and SD6 and SD7 which was totally unrelated to the quarrel between the deceased and the G appellant in 1998. The offence in question with which the appellant is charged with was committed on 7 April 2000, ie, about two years later after the said quarrel between the deceased and the appellant.

[29] The fourth issue raised by counsel for the defence is related to the H third issue discussed above. With regards to this, counsel argued that the learned trial judge misdirected himself and erred in law when he only considered Exceptions 1 and 2 of s 300 of the Code and did not consider Exceptions 3 and 4 of s 300 and also s 299 of the Code.

I **[30]** Section 299 of the Code ('Culpable homicide') read as follows:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

[31] Section 300 of the Code ('Murder') reads:

Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

Illustration (c) reads:

A intentionally gives *Z* a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence. Here *A* is guilty of murder, although he may not have intended to cause *Z*'s death.

[32] Exceptions 1 and 2 provided for under s 300 of the Code reads:

Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:

(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

(c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

Exception 2 — Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

[33] Counsel for the defence argued that the learned trial judge never considered Exceptions 3 and 4 of s 300 of the Code which reads:

> Exception 3 — Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of the public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.
>
> Exception 4 — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

[34] We have carefully perused the evidence before the learned trial judge and all the exceptions under s 300 of the Code and the argument canvassed by counsel with regards to s 299 of the Code and the exceptions under s 300 referred to by him and we cannot see how a case of provocation falling within any of the exceptions could be made out on behalf of the appellant. The facts of this case has been dealt with in detail by the learned trial judge in his grounds of decision. What is clear from the evidence is that it was the appellant who went to said house on the day of the incident carrying with him a *parang*. PW3 testified that she heard a knock on the kitchen-door and that it was the deceased who opened the door. She then saw the appellant slashing the deceased at his neck and stomach. The appellant's contention was that he approached the deceased that night in order to seek clarification from the deceased as to why the latter made some sign at him and uttered certain words earlier in the night when they passed each other whilst travelling on the same road. We cannot see how the defence of provocation under any of the exceptions under s 300 of the Code can have any application to the facts of case. The exceptions provided for under the Code surely cannot apply here. In *Vijayan v Public Prosecutor* [1975] 2 MLJ 8, Choor Singh J in delivering the judgment of the court with regards to Exception 1 said (at p 12):

> In our judgment, under our law, where an accused person charged with murder relies on provocation and claims the benefit of Exception 1 of s 300, the test to be applied is, would the act or acts alleged to constitute provocation have deprived a reasonable man of his self-control and induced him to do the act which caused the death of the deceased and in applying this test it is relevant to look at and compare the act of provocation with the act of retaliation.
>
> To put it in another way, it must be shown distinctly not only that the act which caused death was done under the influence of some feeling which took away from the accused all control over his actions, but also that that feeling had an adequate cause and here again it is relevant to compare the provocative act with the act of retaliation. If it can reasonably be said that these two acts more or less balance each other in the sense that the proved provocation could have driven a reasonable

person to do what the accused did, then he is entitled to the benefit of this Exception. On the other hand, if the act of retaliation is entirely out of proportion to the provocation offered, the plea of grave and sudden provocation fails. It is needless to add that the matter must be considered objectively and that the burden is on the accused to establish provocation on a balance of probabilities. (*Jayasena v Regina* [1970] 1 All ER 219).

[35] We are of the view that the provocation in the instant appeal, if any, was trivial under the circumstances of the case. The said quarrel between the deceased and the appellant occurred in 1998 whereas the offence with which the appellant was charged with was committed on 7 April 2000, that is, about two years later. There is no evidence of any other quarrel or confrontation between the appellant and the deceased between the two occasions. After passing each other on the road on the day of the incident, there was a lapse of time or a cooling off-period before the appellant went to confront the deceased at the said house. If at all the deceased had made some sign at him and uttered some words which he could not make out, we do not think that the provocation, if any, was so grave, by the standards of a reasonable man, as to warrant a retaliation by the appellant with a *parang*. We are also of the view that the provocative act of the deceased, if any, was not capable of constituting provocation sufficient for the court to reduce the charge of murder to culpable homicide not amounting to murder. The bodily injuries inflicted upon the deceased were clearly disproportionate to the act of provocation, if any, caused by the deceased and hence we would agree with the learned deputy public prosecutor that the defence of provocation under any of the exceptions under s 300 of the Code cannot have any application to the facts of this case.

[36] The appellant was charged with murder and hence the prosecution must prove the following ingredients:

(i) that the death of Balakrishnan a/l Karuppusamy, viz, the deceased had taken place;

(ii) that his death had been caused by or in consequence of the act of the appellant; and

(iii) such act was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused her death.

[37] It is not in dispute that the first ingredient has been proved. With regards to the second and third ingredients the prosecution has adduced the following evidence:

(i) at about 9.30pm on the day of the incident, the deceased was having his dinner and subsequently went to wash up; SP3 was also at home at the material time;

(ii) later there was a knock on the kitchen door to the said house and upon opening it the deceased was attacked by the appellant with a *parang*;

(iii) there was struggle and in the course of it the deceased was slashed and stabbed in the heart; SP3 saw the appellant slashing the neck of the deceased and when he fell, the appellant sat on his body and continued attacking the deceased with the *parang*; she went to his aid and was injured in the process;

(iv) the appellant then ran away;

(v) upon being informed at about 11pm on the day of the incident that an ambulance was required, SP5 went to the said house and found the deceased lying on the floor in a pool of blood; he examined the body and found that the deceased was dead;

(vi) SP2, the doctor who conducted the post-mortem found several cuts and stab wounds on the deceased's head, neck, arms and chest and opined that the cause of death was a stab injury to the heart; he was of the view that the injuries 'could have been caused by a long sharp weapon which can go through like a *parang*'.

[38] We are of the view the learned trial judge was correct in finding that the prosecution had made out a prima facie case against the appellant when the case for the prosecution was concluded. The learned trial judge has considered the defence of grave and sudden provocation under exception 1 of s 300 of the Code and surmised that such defence could not subsist under the circumstances of the case. After considering all the evidence adduced before him, the learned trial judge held that the prosecution succeeded in proving a case beyond reasonable doubt against the appellant that he murdered the deceased. He was found guilty and duly convicted and sentenced to death under s 302 of the Code.

[39] Premised upon the reasons given above, we were satisfied that the defence of provocation under any of the exceptions under s 300 of the Code was not available to the appellant and accordingly the appellant's appeal against his conviction was dismissed.

Appeal dismissed.

Reported by K Nesan